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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 315

J. S. ODLAND, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,

Petitioner,

vs.

FAIRMONT SUPPLY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

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No. 315

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vs.

FAIRMONT SUPPLY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. S. Odland, as Receiver of the National Bank of Fairmont, West Virginia, by direction of the Comptroller of the Currency, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Marion County, West Virginia, rendered in this case on February 13, 1942 (R. 186), an appeal from this judgment having been refused by the Supreme Court of Appeals of West Virginia on May 18, 1942 (R. 1).

I.

Opinions and Decrees of Courts Below.

The final judgment of the Circuit Court of Marion County, West Virginia (R. 186-191), entered on February 13, 1942, is not reported. The order of the Supreme Court of Appeals of West Virginia on May 18, 1942, refusing the appeal prayed for by petitioner appears in the record at page 1.

Earlier Proceedings.

The decree of the Circuit Court of Marion County, West Virginia, dated November 12, 1940, overruling respondent's demurrer, appears in the record at pages 148-152. The order of the Supreme Court of Appeals of West Virginia of March 15, 1941, reversing the decree of November 12, 1940, appears in the record at page 153, and the order of the Supreme Court of Appeals of West Virginia of May 19, 1941, denying rehearing, appears in the record at page 154. The opinion of the Supreme Court of Appeals of West Virginia of March 15, 1941, is reported in 14 S. E. (2d) 436 and appears in the record at page 194. The Supreme Court of the United States denied a petition for writ of certiorari, "for the want of a final judgment", on November 10, 1941, No. 669, October Term, 1941, 314 U. S. 679.

II.

Jurisdiction.

Jurisdiction to review the judgment of the Circuit Court of Marion County, West Virginia, is granted by Section 237(b) of the Judicial Code (U. S. C. title 28, sec. 344(b)) providing for the granting of a writ of certiorari by this Court to review a final judgment or decree of the highest

court of a state in which a decision could be had in which a right, title or privilege is claimed under a statute of the United States.

As will more fully hereinafter appear, petitioner, as receiver of said national bank, claims, under the national banking laws, the rights, titles and privileges by him asserted and relied upon in the aforesaid cause by him filed.

The record discloses that petitioner's appeal from the judgment of the Circuit Court of Marion County entered on February 13, 1942 (R. 186-191) was refused by the Supreme Court of Appeals of West Virginia on May 18, 1942 (R. 1) *as plainly right* and hence it follows that the decree of the Circuit Court of Marion County, West Virginia, constitutes the final decree of the highest court of the state in which a decision could be had. Sections 5795 and 5811 of the West Virginia Code; *Moore* v. *Johnson,* (1884) 24 W. Va. 549; *Blumberg* v. *Snyder,* (1922) 90 W. Va. 145, 148; *Virginian Railway Company* v. *Mullins,* (1926) 271 U. S. 220; *Wheeling Steel Corp.* v. *Fox,* (1936) 298 U. S. 193, 205; *Norfolk Turnpike Co.* v. *Virginia,* (1912) 225 U. S. 264.

III.

Summary Statement of the Matters Involved.

Petitioner's predecessor Howard Hardesty, as Receiver of the National Bank of Fairmont, West Virginia, filed suit (R. 11-24) in the Circuit Court of Marion County, West Virginia, against Respondent to compel it to perform its contract to purchase from said receiver certain real property constituting assets of the receivership. The bill of complaint alleged in substance:

That the predecessor receiver, one Robert C. Miller, had as receiver of said bank obtained judgment against a debtor of the bank, and thereafter said Miller, as such receiver,

filed proceedings to cause the sale of certain real estate belonging to said debtor and to have the proceeds thereof applied towards satisfaction of said judgment (R. 14-19). At the sale of said property by the Special Commissioner appointed by the court for that purpose, said Miller, as such receiver, in pursuance of instructions from the Comptroller of the Currency, and as permitted by the Act of Congress of March 29, 1886, (U. S. C. title 12, sec. 198-200; App. pg. 26-28, see discussion, *infra,* pg. 14, purchased said real estate (R. 18) and the proceeds of the purchase price were duly credited upon said judgment (R. 19). The Special Commissioner, by direction of the court, upon performance of said sale, executed deeds of said real estate to said Miller. (The bill of complaint, para. VI (R. 19) states that the property was conveyed by said deeds to "R. C. Miller, Receiver * * *", but Exhibits P. to S., referred to in said paragraph show (R. 80-91) that the full name, "Robert C. Miller", was used in said deeds, so that the Special Commissioner's deeds ran to "Robert C. Miller, Receiver of the National Bank of Fairmont, an insolvent national banking association".)

That the sale of said real estate to said Miller was: (R. 18) "In fact made to said R. C. Miller in his capacity as Receiver of said *The National Bank of Fairmont,* and which purchase money was in fact paid by said receiver as such from the funds of said The National Bank of Fairmont, * * *".

That thereafter said Robert C. Miller died, and Howard Hardesty was appointed successor to said Miller as receiver of the bank.

In due course, Howard Hardesty as receiver, by direction of the Comptroller (R. 20) sold said real estate to respondent,—Fairmont Supply Company, a corporation,—and a written contract covering said sale was executed by Howard Hardesty as receiver and by respondent, and a payment

on account was made, the balance to be paid in due course at the closing of the transaction (R. 20; R. 91). Said sale by Howard Hardesty as receiver was duly approved by the Circuit Court of Marion County, West Virginia, in accordance with the requirements of U. S. C. title 12, sec. 192 (R. 21).

Thereupon said receiver tendered respondent appropriate receiver's deeds purporting to convey said property to respondent. Respondent refused to complete the sale on the ground that receiver's title was defective for the reasons hereinafter indicated.

Howard Hardesty, as receiver of said bank, thereupon filed the bill of complaint in the instant case in the Circuit Court of Marion County, West Virginia, to compel specific performance, setting forth, in detail, the previous court proceedings covering the purchase and acquisition of title of said property by said Miller, as receiver, and the subsequent sale of the property by Howard Hardesty, as successor receiver, to the Fairmont Supply Company.

Respondent demurred to the bill of complaint (R. 144-148) and therein set up by way of defense that said bill of complaint did not show the receiver had such title to said real estate as would enable him to "institute, prosecute and maintain this chancery cause against said defendant" (R. 144), and hence that "defendant as such purchaser would acquire no title or interest in said real estate by acceptance of any deed from said plaintiff" (R. 145).

As grounds for the defense thus made by said demurrer, respondent therein contended:

(a) Said deeds of the Special Commissioner should have conveyed said property to "The National Bank of Fairmont" (R. 147) and that in the language of said deeds purporting to convey title to said property to "Robert C. Miller, Receiver of The National Bank of Fairmont, an

insolvent national banking association," the words "Receiver of The National Bank of Fairmont, an insolvent national banking association," were merely descriptive words of Robert C. Miller (R. 145), and "that by virtue of such conveyances the legal title and equitable title to said real estate vested in Robert C. Miller, individually, and that by reason thereof, neither the said Robert C. Miller in his capacity as Receiver of said The National Bank of Fairmont, nor the said bank itself, acquired any title to said real estate, either legal or equitable" (R. 144).

(b) That upon the death of said former Receiver, the title to said real estate passed and vested in the heirs at law of said Miller (R. 145).

(c) That even:

> "If it could be legally established that some title or interest in said real estate did pass to and vest in the said Robert C. Miller in his fiduciary capacity as Receiver of said The National Bank of Fairmont, the same has not been by any instrument or operation of law, or in any other way, transferred or vested in said plaintiff, as successor Receiver to the said Robert C. Miller, Receiver of said The National Bank of Fairmont" (R. 145).

The Circuit Court of Marion County, West Virginia, overruled respondent's demurrer to the receiver's bill of complaint and in effect held that said Robert C. Miller, as Receiver of said bank, had, by said deeds from said Special Commissioner, acquired good title to said real estate in his official capacity as receiver of said bank, and that Howard Hardesty, as successor receiver of said bank, obtained good title to said property and could convey good title thereof to the Fairmont Supply Company, as the purchaser thereof from petitioner at the aforesaid auction sale.

Decision of Supreme Court of Appeals of West Virginia on March 15, 1941.

Upon certification of points of law to the Supreme Court of Appeals of West Virginia (R. 149-153), the Supreme Court of Appeals reversed the Circuit Court and sustained the points raised in respondent's demurrer. The court held in effect, that the deeds from the Special Commissioner to Miller, the predecessor receiver, conveyed title to said property to Miller individually, and not to him in his representative capacity on behalf of the bank, and further, that even if it be assumed that title had passed to Miller in his representative capacity, as receiver, said title did not, after the death of Miller and upon the appointment of his successor Howard Hardesty, pass to the successor receiver inasmuch as there was no provision in the national banking laws for passage of title by operation of law, from a receiver of a national bank to a successor receiver. More specifically, the court held:

(1) In considering the questions presented, consideration must be given to the effect of appointment of a Receiver of a national bank and the authority and powers of the Receiver so appointed (R. 196).

(2) An insolvent national bank does not lose its corporate existence upon the appointment of a Receiver, and the bank may still enter into transactions not forbidden by law (R. 196).

(3) In the light of the West Virginia case of *Rhinehart, Receiver* v. *Ireland,* 120 W. Va. 599, 199 S. E. 871, a receiver of a state bank has authority to take title in his own name in his official capacity to property purchased by him on behalf of his receivership, but a state bank receiver has "wider powers than those given to the receiver of a

national bank. The receiver of a national bank is an agent whose authority is limited by law" (R. 198).

(4) Under the law of West Virginia,—"where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually" (R. 197).

Hence, notwithstanding Receiver Miller "was apparently acting in a fiduciary capacity as Receiver of the bank" and even "if he used the funds of his trust in purchasing said real estate" (R. 198), the deeds purporting to convey title to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association" had the effect of conveying legal title to Robert C. Miller, individually.

(Point 3, as certified to the Supreme Court of Appeals, was to the effect (R. 150) that even if it were assumed that title did pass to said Robert C. Miller in his fiduciary capacity as receiver, "there is no statutory provision, *either Federal or State,* transferring legal or equitable title for real estate from a receiver of a Federal bank to a successor receiver of a Federal bank.")

The decision of the Supreme Court of Appeals upon the foregoing certified point was as follows:

(5) There is no "statute which authorizes the receiver of a national banking association to take title from his deceased predecessor by operation of law. There being no such statutory provision, the legal title, upon the death of Miller, passed to his heirs by the laws of descent prevailing in this jurisdiction" (R. 198).

A petition for writ of certiorari to review the decision of the Supreme Court of Appeals of West Virginia (No. 669,

October Term, 1941) was denied by this Court *for the want of a final judgment* on November 10, 1941.

Final Judgment in Circuit Court of Marion County.

After the case was remanded to the Circuit Court the plaintiff amended his bill, making the heirs of Robert C. Miller parties defendant, and averred that the said Robert C. Miller in his lifetime in his trust capacity as receiver of The National Bank of Fairmont, pursuant to authority from the Comptroller of the Currency, purchased the real estate in question for his trust, and paid therefor out of the trust funds in his hands, and that the title conveyed to him as such receiver was in fact intended to be solely for the benefit of his trust, and that Robert C. Miller did not, nor did his heirs, have any interest in said real estate individually (R. 155-173). All the adult heirs answered the amended bill admitting its allegations (R. 175). The Fairmont Supply Company answered the amended bill admitting its allegations (R. 177). The matter was continued for further hearing as to the infant defendant (R. 179). Later, plaintiff moved to dismiss his amended bill in order that there might be a final decree on the sufficiency of the original bill and that the questions arising on the demurrer to the original bill might be again reviewed (R. 180).

The respondent, Fairmont Supply Company, objected to the dismissal of plaintiff's amended bill, but its objection was overruled and plaintiff's amended bill was dismissed (R. 189). J. S. Odland, as Receiver of The National Bank of Fairmont, was substituted as party plaintiff in this cause in lieu and stead of said Howard Hardesty who resigned as receiver (R. 187). Plaintiff then declined to amend his original bill after the dismissal of the amended bill, and thereupon the court entered the order complained of here, wherein it sustained the demurrer of Fairmont Supply

Company to plaintiff's original bill, denied plaintiff the relief prayed for, and decreed "that the bill of complaint of the plaintiff filed herein and this cause be and the same are hereby dismissed" (R. 189).

Petitioner thereupon filed in the Supreme Court of Appeals of West Virginia a petition for an appeal from said final decree entered by the Circuit Court of Marion County under date of February 13, 1942, and assigned errors (R. 8) which are repeated here for convenience:

FIRST, in sustaining the demurrer of Fairmont Supply Company to plaintiff's original bill and in dismissing said cause.

SECOND, in holding that under the National Bank Act, and particularly under U. S. C., Title 12, Chapter 2, Sections 191, 192, 198, 199 and 200, Robert C. Miller as Receiver, did not have capacity and power to take title to said real estate in his name in his official capacity as receiver of said bank, but that the title, though paid for out of trust funds of the bank, should have been conveyed to the bank, and because it was conveyed to him as Receiver, upon his death the title passed to his heirs.

THIRD, in holding that under the National Bank Act, and particularly under U. S. C., Title 12, Chapter 2, Sections 191, 192, 198, 199 and 200, the title conveyed to Robert C. Miller in his official or fiduciary capacity did not, upon his death, pass to his successor Receiver by operation of law.

FOURTH, in holding that notwithstanding the provisions under the National Bank Act, and particularly under U. S. C., Title 12, Chapter 2, Sections 191, 192, 198, 199 and 200, that though the property was paid for by the Receiver out of funds of his trust for the benefit of his trust, where the Receiver took title to himself in his official capacity, the rule of law in West Virginia which makes the official title or

name in office merely *descriptio personae* of the grantee, applies to deeds purporting to convey title to real estate in that State to the receiver of a national bank in his official capacity, and therefore, the title in such a conveyance passed to the receiver individually.

FIFTH, in holding that notwithstanding the provisions under the National Bank Act, and particularly under U. S. C., Title 12, Chapter 2, Sections 191, 192, 198, 199 and 200, the foregoing matters in the instant case are questions controlled by the laws of the State of West Virginia and not by the national banking laws of the United States.

Petitioner's appeal to the Supreme Court of Appeals of West Virginia was refused by that court (R. 1).

IV.

Specification of Errors.

The Circuit Court of Marion County erred:

(1) In holding that under the national banking laws and particularly under U. S. C., Title 12, Secs. 191, 192, 198, 199 and 200, Robert C. Miller, as Receiver of an insolvent national bank, did not have capacity and power to take title to said real estate, in his name, in his official capacity as receiver, but that the title, though paid for out of trust funds of the bank, should have been conveyed to the bank, and because it was conveyed to him as receiver, upon his death the title passed to his heirs.

(2) In holding that under the national banking laws the title conveyed to Robert C. Miller in his official or fiduciary capacity, did not, upon his death, pass to his successor receiver by operation of law.

(3) In holding that notwithstanding the provisions of the national banking laws, though the property was paid for

by the receiver out of funds of his trust for the benefit of his trust, where the receiver took title in his name in his official capacity, the rule of law in West Virginia which makes the official title or name in office merely *descriptio personae* of the grantee, applies to deeds purporting to convey title to real estate in that State to the receiver of a national bank in his official capacity, and therefore, the title in such conveyance passed to the receiver individually.

(4) In holding that notwithstanding the provisions of the national banking laws, the foregoing matters in the instant case are questions controlled by the laws of West Virginia and not by the national banking laws of the United States.

V.

Questions Presented.

(1) Under the national banking laws, does the receiver of a national bank, when duly authorized to purchase real property on behalf of his receivership, have capacity and power to take title to said property in his name, in his fiduciary and representative capacity as receiver of said bank, or must said title in terms be conveyed to, and in the name of, the receivership bank as a corporation, in order to avoid the consequences of title passing to said receiver in his individual and personal capacity?

(2) Upon the death or resignation of a receiver of a national bank, do the receivership assets pass, by operation of the national banking laws, from the predecessor receiver to his successor in office?

(3) Does the law of West Virginia to the effect that:

> "Where a conveyance is made to a person whose name is followed by an official title or name of office, the title

> or office is merely *descriptio personae* of the grantee and title vests in the grantee individually.",

apply to deeds purporting to convey title of real property to a national bank receiver in his fiduciary or representative capacity as receiver?

VI.

Contentions of Petitioner.

(1) The National Bank Act (U. S. C., Title 12, Sec. 192) provides that upon appointment of a receiver for a national bank, said receiver, under the direction of the Comptroller of the Currency, shall take possession of the assets of said bank, collect and liquidate debts and obligations belonging to it, and, upon the order of a court of record of competent jurisdiction, said receiver may sell all of the real and personal property of the bank; and that all money received by him from such liquidation shall be paid to the Treasurer of the United States, subject to the order of the Comptroller of the Currency (Appendix, p. 26).

This statute does not, however, in terms specify whether title to receivership assets shall remain and continue in the national bank as owner or whether title shall pass to the receiver.

The decisions of this Court have held, however, in substance, that title to assets of a national bank pass by operation of law to the receiver as a statutory assignee. In *Kennedy* v. *Gibson* (1869), 8 Wall. 498, this Court held (at p. 506):

> "The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when

> he sues in his own name it is not necessary to make either a party to the suit."

Other cases are to the same effect. See *Scott* v. *Armstrong* (1892), 146 U. S. 499, 506; *Earle* v. *Pennsylvania* (1900), 178 U. S. 449, 455; *Fish* v. *Olin* (Vt.), 56 Atl. 533, 534, 76 Vt. 120; *Anderson* v. *Cronkleton* (C. C. A. 8th, 1929), 32 F. (2d) 170, 171.

The Act of March 29, 1886 (U. S. C., Title 12, Secs. 198-200; Appendix, p. 26-28, provides, in effect, that when properly authorized by the Comptroller of the Currency and by the Secretary of the Treasury, the receiver of a national bank may, for the protection of the receivership interests, purchase property at execution sale and expend funds of the receivership in payment for such property.

The foregoing statutory provisions do not indicate or specify whether title shall be taken in the name of the receiver in his fiduciary or representative capacity, or whether title shall be taken in the name of the national bank as a corporation.

Examination of the authorities seems to indicate that this question has not been passed upon by the courts. However, the cases above cited hold that title to assets of the receivership bank passes to the receiver as a statutory assignee and that suits on behalf of the bank may be brought in the name of the receiver and, consequently, it is believed the conclusion should also be reached that under said Act of March 29, 1886, *supra,* it was intended, or at least permitted, that title to the property thus purchased could be taken in the name of the receiver in his fiduciary or representative capacity as receiver. In *American Surety Co. of New York* v. *Bethlehem Nat'l Bank,* 314 U. S. 314, 316, this Court held in passing on a question arising in the liquidation of an insolvent national bank:

> "Congress has seen fit not to anticipate by specific rules solution of problems that inevitably arise in national bank liquidations."

It has long been the construction of said Act of March 29, 1886, by the Comptrollers of the Currency, and, in consequence thereof, it has long been the settled practice, that title to real property acquired under authority of said statute should be taken in the name of the receiver in his fiduciary or representative capacity, rather than in the name of the bank as a corporation.

This Court has uniformly held that great weight may properly be given to settled construction of a statute by the Executive Department charged with its administration, and that such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson,* (1929) 280 U. S. 183, 193; *Heath* v. *Wallace,* (1891) 138 U. S. 573, 582; *Brewster* v. *Gage,* (1929) 280 U. S. 327, 336; *Inland Waterways Corp.* v. *Young,* (1940) 309 U. S. 517, 524; *Rawlings* v. *Ray,* (1941) 312 U. S. 96, 99.

No question is raised concerning the fact that Receiver Miller had been duly authorized to purchase the real property in question and to pay for the same from the funds of the receivership (*supra,* p. 5, 6).

In view of the foregoing, it would seem clear that the general rule of property law of West Virginia to the effect that "Where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually", has no application to the deeds executed to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association". The doctrine established by cases such as

Erie R. Co. v. *Tompkins,* 304 U. S. 64, does not require, nor permit, under the circumstances of the instant case, that the aforesaid rule of West Virginia property law apply to the aforesaid deeds.

(2) There is no provision in the national banking laws specifically indicating that upon the death or resignation of a receiver of a national bank, the title to the receivership assets shall pass to and vest in the successor receiver.

Examination of the reported cases seems to indicate that there are no decisions of this Court, or any other court, passing upon this question.

It has long been the position of the Comptrollers of the Currency, that upon the death or resignation of a receiver of a national bank, the title to the assets acquired by said receiver as statutory assignee, does pass, by operation of the national banking laws, to his successor receiver. Under the doctrines established in the cases previously cited, *supra,* (p. 15) it would seem that this interpretation and construction of the law by the Comptroller should not be disturbed. It is obvious that a contrary interpretation or construction to the effect that title does not pass from a receiver to his successor receiver, by operation of law, and that deeds of conveyance from the predecessor receiver, or his heirs, must be obtained, or that suits to establish title in the successor receiver must be filed, would seriously interfere with the liquidation of the receivership. A construction of the law having such consequences should not be adopted unless the previous position was clearly wrong, or unless a different construction is plainly required.

The sound construction of the law upon this point would seem to be that title to the receivership assets is, in legal effect, attached to, and vested in, the official office of receiver, and that changes from time to time in the incumbents of that office do not change or affect the situs of title

and consequently that each successor receiver in turn takes title as substituted statutory assignee.

Some help, in this connection, would seem to be derived, by analogy, from the provisions of section 11(a) of the Act of Congress of February 13, 1925 (U. S. C. title 28, c. 18, section 780, appendix, p. 28) wherein it is provided, in effect, that upon the death or resignation of an officer of the United States during the pendency of a suit relating to the discharge of the official duties of such officer, the court may permit the substitution of the successor in office of such officer. This statutory provision seems to recognize that the cause of action, and the rights incident thereto, are vested in the official office of said public officer, and not in said officer individually or personally. The following cases, construing said statute or similar statutes, seem to support this construction: *Allen* v. *Regents*, 304 U. S. 439, 444; *Thomas B. Bishop Co.* v. *Santa Barbara County, et al.*, (C. C. A. 9, 1938) 96 F. (2d) 198, 199-203, cert. den. 305 U. S. 623; *Brown-Crummer Inv. Co. of Wichita, Kan., et al.* v. *City of Florala, Ala., et al.*, 55 F. (2d) 238, 243; *Bowers, Collector of Internal Revenue* v. *American Surety Co.*, (C. C. A. 2, 1929) 30 F. (2d) 244, 246; *Sadler, Overseer of Poor* v. *Jeppson*, (1912) 82 N. J. L. 20, 82 Atl. 316-317; *Commonwealth* v. *Southern Pac. Co.*, (Ct. of Appls., Ky., 1907) 105 S. W. 466-468.

It is settled doctrine that the receiver of a national bank is an officer of the United States, and is the agent or representative of the Comptroller of the Currency, for the purpose of the administration of the receivership bank, and for the liquidation of its assets. See *U. S.* v. *Weitzel*, 246 U. S. 533, 541; *Kennedy* v. *Gibson, et al.*, and other cases, cited, p. 14 *supra*.

It is a general rule that the title, rights and powers of a trustee are annexed to the office, so as to pass to, and be capable of being dealt with and exercised by, a successor

of the original trustee, without any conveyance or assignment to the new trustee by the retiring trustee. *Lahey* v. *Kortright,* (Court of Appeals, N. Y., 1892) 132 N. Y. 450, 30 N. E. 989, 990; *Copple* v. *Morrison,* (Iowa, 1935) 264 N. W. 113, 115; *In re Doe's Will,* (Wisc., 1939) 285 N. W. 764, 767; *First Trust Co.* v. *Airedale Ranch & Cattle Co.,* (Nebr., 1939) 286 N. W. 766, 771; *Thomas* v. *Nat. Bank of Commerce,* (Wash., 1936) 60 Pac. (2d) 264, 269; *Gregory* v. *Merchants State Bank,* (Tenn., 1939) 135 S. W. (2d) 465, 474; *Stearns* v. *Fraleigh,* 39 Fla. 603, 23 So. 18, 21; *Coleman-Bush Inv. Co.* v. *Figg,* 95 Ky. 403, 25 S. W. 888; *Stokes* v. *Amerman,* (Sup. Ct. N. Y., 1889) 7 N. Y. S. 733, 734; *Fatjo* v. *Swasey,* 111 Calif. 628, 44 Pac. 225; *Bogert, Trusts & Trustees,* (1935) Vol. 3, sec. 532.

In the absence of a clear intention to the contrary, the power of sale conferred on a trustee is annexed to the office and passes to any person lawfully substituted in the place of the original trustee. *Lahey* v. *Kortright,* (Court of Appeals N. Y., 1892) 132 N. Y. 450, 30 N. E. 989, 990; *Freeman* v. *Pendergast,* 94 Ga. 369, 21 S. E. 837, 844; *Haggin* v. *Straus,* 148 Ky. 140, 146 S. W. 391, 395; *Safe Deposit & Trust Co.* v. *Ellis,* 136 Md. 334, 110 Atl. 481, 483; *Strite* v. *Wolf,* 268 Pa. 221, 110 Atl. 753, 754; *Royce* v. *Adams,* 123 N. Y. 402, 25 N. E. 386.

The courts have held that on appointment of a new trustee, title to the trust property vests in him by virtue of the appointment and without necessity of a formal conveyance. *Thomas* v. *Nat. Bank of Commerce* (Wash., 1936) 60 Pac. (2d) 264, 269; *Gregory* v. *Merchants State Bank,* (Tenn., 1939) 135 S. W. (2d) 465, 474; *Freeman* v. *Pendergast, supra; Parkhill* v. *Doggett,* 135 Ia. 113, 112 N. W. 189, 190; *Toronto General Trust Co.* v. *Chicago, B. & Q. R. Co.,* 123 N. Y. 37, 25 N. E. 198, 200; *Wooldridge* v. *Planters Bank,* 1 Sneed (Tenn.) 297, 302; *McCallum* v. *Wing,* (C. C. A. 1st,

1929) 30 F. (2d) 505, 510; *Bogert, Trusts & Trustees,* (1935) Vol. 3, sec. 532.

VII.

Federal Question.

It would seem clear that the instant case raises federal questions within the purview of section 237(b) of the Judicial Code.

Respondent, in denying the acquisition of title to the real property by the receiver, and in denying that the Bill of Complaint presented a cause of action to compel respondent to perform specifically the contract of sale, raised certain points in his demurrer (R. 144-148), which points, in turn, by reason of the decision of the Trial Court (R. 188), were made the basis of the petition for appeal presented to the Supreme Court of Appeals of West Virginia in the assignment of errors (R. 8). As previously indicated herein under "Questions Presented", *supra,* p. 12, respondent contended and the courts below ruled that under the national banking laws, petitioner's predecessor as receiver did not have capacity or power to take title to the real estate in his name, even though taken in his name in his fiduciary or representative capacity, and title passed to Receiver Miller, individually. The point was also made in this connection that under the national banking law title should have been taken in the name of the bank as a corporation. It was further contended by respondent and ruled by the courts below in favor of respondent, that even if it were to be assumed that legal title to the property did pass to petitioner's predecessor in his fiduciary or representative capacity, there was no provision in the national banking law whereby title passed or could pass by operation of law from petitioner's predecessor, Robert Miller, to a successor receiver.

On the other hand, petitioner contended that under the settled construction of national banking law, title to real estate purchased on behalf of the receivership, with receivership funds, by direction of the Comptroller of the Currency and the Secretary of the Treasury, could lawfully be acquired by the receiver in his fiduciary or representative capacity; and that upon the death or resignation of a receiver, title passed by operation of the national banking law to his successor receiver.

It was also contended by respondent, and so ruled in its favor by the courts below, that the effect and operation of the deeds in question were governed by West Virginia laws and that under said laws title passed to the predecessor receiver in his individual capacity and hence thereafter passed to heirs-at-law of petitioner's predecessor. *On the other hand, petitioner contended that these questions were controlled by the national banking law, as interpreted and construed by the courts.*

As previously herein pointed out, *supra,* p. 7, the decision of the Supreme Court of Appeals of West Virginia, (R. 194), and the decision of the Circuit Court of Marion County upon remand of the case to that court (R. 186), were predicated primarily on the construction and interpretation given by those courts of the national banking law. In its opinion (R. 196), the Supreme Court of Appeals stated:

> "In order that the questions involved in this certificate may be properly discussed, it is necessary to consider the effect of the appointment of a receiver for a national banking association by the Comptroller of the Currency, as well as the authority and powers of the receiver so appointed."

This Court has held that where the receiver of a national bank claims rights under the national banking law, and

such rights are denied by a State court, a Federal question is involved. *Seabury* v. *Green,* (1935) 294 U. S. 165, 168.

It is settled doctrine that the national banking laws, as interpreted and construed by the courts, constitute a complete system covering not only the organization but also the liquidation in receivership of national banks, and that state laws cannot be effective when in conflict with the national banking law, or where the state law, if applied, would defeat the purposes of the national banking law. *Cook County National Bank* v. *United States,* (1882) 107 U. S. 445, 448; *Jennings* v. *U. S. F. & G. Co.,* (1935) 294 U. S. 216, 226; *Davis* v. *Elmira Savings Bank,* (1896) 161 U. S. 275, 283; *Yonkers* v. *Downey,* (1940) 309 U. S. 590, 596; *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 200; *Rawlings* v. *Ray,* (1941) 312 U. S. 96; *Easton* v. *Iowa,* (1902) 188 U. S. 220, 230-232.

It is also settled doctrine that receivers of national banks are officers of the United States and agents of the Comptroller of the Currency, and derive their authority and power and capacity to act from the national banking law (as implemented by court decisions) subject, of course, to appropriate instructions from the Comptroller of the Currency. *Kennedy* v. *Gibson, et al.,* (1869) 8 Wall. 498, 504-506; *In re Chetwood,* (1897) 165 U. S. 443, 458; *U. S.* v. *Weitzel,* (1918) 246 U. S. 533, 541; *Pufahl* v. *Parks,* (1936) 299 U. S. 217, 225; *Cooper* v. *O'Connor,* (App. D. C., 1938) 99 F. (2d) 135, 139, *cert.* den. 305 U. S. 643; *Cooper* v. *O'Connor,* (App. D. C., 1939) 105 F. (2d) 761, 763.

It would seem clear that either by express provision of the national banking statutes or by implementation of said statutes by court decisions interpreting and construing the same, the issues in the instant case are embraced within the provisions and requirements of the national banking law as thus implemented, and consequently the question for de-

cision is therefore one of federal law. *American Surety Company* v. *Bethlehem National Bank,* (1941) 314 U. S. 314, 316; *Rawlings* v. *Ray,* (1941) 312 U. S. 96, 98; *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 200; *Merrill* v. *National Bank,* 173 U. S. 131; *Davis* v. *Elmira Savings Bank,* (1896) 161 U. S. 275; *Cook County National Bank* v. *United States,* (1882) 107 U. S. 445, 448.

VIII.

Finality of Judgment.

It would seem clear that the judgment of the court below is final within the purview of Sec. 237(b) of the Judicial Code.

Petitioner, by the bill of complaint in the instant case, set forth therein, fully and completely, the derivation of title of the property in question, and the alleged accrual and vesting of said title in the receiver and sought to compel respondent to carry out its contract for the purchase of said property. Respondent denied the receiver had title to said property, and denied, therefore, the claim or right of petitioner to compel respondent to perform said contract and purchase said property. The court below sustained the contention of respondent and held that Howard Hardesty, as receiver of the bank, did not have title to the property, and further, by necessary implication and inference, held that the bank did not have title to said property, and accordingly decided that petitioner could not compel specific performance of the contract.

As is shown by proceedings heretofore filed in this Court, No. 669, October Term, 1941, Petitioner's predecessor Howard Hardesty, as Receiver of The National Bank of Fairmont, West Virginia, applied for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case, entered on March

15, 1941 (R. 153) and said petition was denied November 10, 1941, *for the want of a final judgment.* The further proceedings in the Circuit Court of Marion County are shown in the record at pages 155-191. The Circuit Court, in compliance with said judgment of the Supreme Court of Appeals of West Virginia, decreed on February 13, 1942, Plaintiff's original bill of complaint be dismissed (R. 186, 189).

The judgment of the Circuit Court of Marion County thus disposed of the merits of the case involving the claim of title by the Receiver and the denial of title by Respondent and the suit by Petitioner to compel specific performance of the contract.

Petitioner thereupon filed in the Supreme Court of Appeals of West Virginia a petition for an appeal from said final decree entered by the Circuit Court of Marion County on February 13, 1942 (R. 3).

On May 18, 1942, the Supreme Court of Appeals of West Virginia refused to grant the appeal prayed for as "plainly right" (R. 1) and hence it follows that the decree of the Circuit Court of Marion County constitutes the final decree of the highest court of the State in which a decision could be had. Sections 5795 and 5811 of the West Virginia Code; *Moore* v. *Johnson,* (1884), 24 W. Va. 549; *Blumberg* v. *Snyder* (1922), 90 W. Va. 145, 148; *Virginian Ry. Co.* v. *Mullins* (1926), 271 U. S. 220; *Wheeling Steel Corp.* v. *Fox* (1936), 298 U. S. 193, 205.

IX.

Reasons Relied Upon for Requested Allowance of Writ.

(1) The decision of the court below, to the effect that a receiver of a national bank cannot take title in his own name, in his representative or fiduciary character as receiver, of real estate acquired on behalf of the receivership

during the course of liquidation would seem to be directly in conflict, in principle, with the decisions of this Court in the case of *Kennedy* v. *Gibson, et al.*, and of the other cases, cited on p. 14 hereof. to the effect that the receiver is a statutory assignee of the assets of a national bank and that title to such assets passes to him as receiver.

The decision of the court below, to the effect that under the national banking laws title to assets of the receivership does not pass, by operation of law, to a successor receiver, would likewise seem contrary to the principles established by the aforesaid cases cited on pp. 13-14 hereof, and in *Kennedy* v. *Gibson, et al., supra,* p. 13.

(2) However, examination of the authorities seems to indicate that neither of the foregoing points has heretofore been specifically passed upon by this Court, and the questions would seem to be of such general importance, incident to the interpretation and construction of the national banking laws, that this Court should grant the writ of *certiorari* for the purpose of settling the law.

(3) As indicated in the discussion herein, *supra,* p. 15, it has long been the established construction and interpretation by the Comptroller of the Currency of the national banking laws upon the foregoing points, that title may properly be taken by receivers of national banks of real estate acquired by them, and that, upon the death or resignation of a receiver, title to the receivership assets passes, by operation of law, to his successor receiver.

Many parcels of real estate thus acquired by receivers of national banks all over this country have been sold.

If the decision of the court below is permitted to stand, serious doubt upon the validity and effectiveness of titles to real estate thus acquired and thus sold by receivers of national banks will result.

It is believed that these consequences are of such importance that this Court may well feel justified in granting the review.

(4) The decision of the court below, as applied in the instant case, seriously affects the administration by the Comptroller of the Currency of the national banking laws relating to the liquidation of national banks in receivership, and, therefore, in the interest of future guidance of the Comptroller in these respects it is believed the law should be settled by an authoritative decision from this Court.

Respectfully submitted,

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APPENDIX.

U. S. C. Title 12, ch. 2, sec. 191.

General grounds for appointment of receiver.

* * * or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, sec. 1, 19 Stat. 63.)

U. S. C. Title 12, ch. 2, sec. 192.

Default in payment of circulating notes.

* * * Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. * * *

U. S. C. Title 12, ch. 2, sec. 198.

Purchase by receiver of property of bank; request to comptroller.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property,

real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (Mar. 29, 1886, c. 28, sec. 1, 24 Stat. 8.)

U. S. C. Title 12, ch. 2, sec. 199.

Approval of request.

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. (Mar. 29, 1886, c. 28, sec. 2, 24 Stat. 8.)

U. S. C. Title 12, ch. 2, sec. 200.

Payment.

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: *Provided, however,* That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury,

for such purpose only and in such manner as he may determine and order. (Mar. 29, 1886, c. 28, sec. 3, 24 Stat. 8.)

U. S. C. Title 28, ch. 9, sec. 344(b).

* * * (b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; * * *

Section 11(a) of the Act of Congress of February 13, 1925 (U. S. C. title 28, sec. 780).

"That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

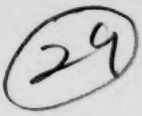
Section 5795 of West Virginia Code. Second Petition.

In a case wherein the court shall deem the judgment, decree or order complained of plainly right, and reject it

on that ground, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court when in session. (Code 1849, c. 182, sec. 10; Code 1860, c. 182, sec. 10; 1872-3, c. 17, sec. 11; 1877, c. 44, sec. 11; 1882, c. 157, sec. 11; Code 1923, c. 135, sec. 11.)

Section 5811 of West Virginia Code. Judgment; Motion to Dismiss; Motion to Affirm, Reverse or Dismiss Involving Merits.

The supreme court of appeals shall affirm the judgment, decree or order, if there be no error therein, and reverse the same in whole or in part, if erroneous, and enter such judgment, decree or order as the court whose error is sought to be corrected ought to have entered, affirming in cases where the court is equally divided. In the case of an appeal from an order granting a new trial or rehearing, if the order be reversed, such final judgment, decree or order shall be rendered or made in the case as the appellant was entitled to in the court below. All motions to dismiss upon grounds not involving the merits of the case shall be made after reasonable notice in writing to the opposite party or his attorney, or given in a brief filed under the rules. With leave of the court previously granted, and after reasonable notice to be prescribed by a rule of the court, a motion to dismiss involving the merits, or to affirm or reverse, may be made at any time after the allowance of the appeal, writ of error or supersedeas; and, upon the hearing of such motion, the court may dismiss, affirm, modify or reverse with like effect as if the appeal, writ of error or other process had been regularly matured for final hearing. (Code 1849, c. 182, sec. 23; Code 1860, c. 182, sec. 34; Code 1868, c. 135, sec. 15; 1872-3, c. 16, sec. 13; 1882, c. 157, sec. 26; 1915, c. 69, sec. 26; 1921, c. 59, sec. 26; Code 1923, c. 135, sec. 26.)



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 315

J. S. ODLAND, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,

Petitioner,

v.

FAIRMONT SUPPLY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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No. 315

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FAIRMONT SUPPLY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

I

Opinions of Courts Below

The judgment of the Circuit Court of Marion County, West Virginia (R. 186-191), entered on February 13, 1942, which dismissed the petitioner's bill of complaint, and which is here sought to be reviewed, was rendered without opinion and is not reported. The order of the Supreme Court of Appeals of the State of West Virginia (R. 1-2), entered on May 18, 1942, refusing, without opinion, appeal from the above-mentioned judgment of February 13, 1942, is also not reported.

The opinion of the Supreme Court of Appeals of the State of West Virginia of March 15, 1941 (R. 194-198), on the basis of which the above mentioned judgment of the Circuit Court of Marion County of February 13, 1942 was entered, is reported in 14 S. E. (2d) 436.

Earlier Proceedings

This is a suit in the Circuit Court of Marion County, West Virginia, for the specific performance of a contract to purchase certain West Virginia real estate, and involves the construction, under West Virginia law, of deeds to that real estate running to the plaintiff's predecessor.

The respondent demurred, on the ground that the bill of complaint showed that under West Virginia law the plaintiff did not have title to the real estate. The Circuit Court of Marion County, West Virginia, by an unreported decree dated November 12, 1940 (R. 148-152) overruled the demurrer, without opinion. The Supreme Court of Appeals of West Virginia handed down the above-mentioned opinion of March 15, 1941 (R. 194-198), 14 S. E. (2d) 436, reversing the ruling of the Circuit Court of Marion County. The unreported order of the Supreme Court of Appeals of West Virginia of March 15, 1941 reversing the lower court's decree of November 12, 1940 is at R. 153. On May 15, 1941 the Supreme Court of Appeals of West Virginia denied, without opinion, a rehearing (R. 154).

On November 10, 1941, the Supreme Court of the United States denied a petition for writ of certiorari "for the want of a final judgment", No. 669, October Term, 1941, 314 U. S. 679.

There followed, on February 13, 1942, the Circuit Court judgment, referred to above, which is here sought to be reviewed.

II

Jurisdiction

The petitioner contends that jurisdiction to review the judgment of the Circuit Court of Marion County is granted by Section 237 (b) of the Judicial Code (U. S. C. A. Title 28, c. 9, Section 344 (b)) providing for the granting of a writ of certiorari by this Court to review a "final judgment or decree" of "the highest court of State in which a decision could be had" where any title, right or privilege is claimed by either party under a statute of the United States.

As appears more fully below, the respondent submits that this suit involves only questions of West Virginia law as to title to West Virginia real estate, that no federal statutory question was involved in the actual decision of the State court, and that, to the extent that federal statutory questions could be considered to have been discussed, the court's comments thereon were not necessary to the actual decision of the case, which was based on a decisive non-federal ground clearly severable from any claimed federal ground.

III

Summary Statement of the Case

This suit is a suit in the West Virginia courts for the specific performance of a contract for the purchase of West Virginia real estate, and is in the nature of a suit to quiet title.

The petitioner, J. S. Odland, is the present receiver of The National Bank of Fairmont, West Virginia (referred

to below as the Bank). The petitioner succeeded Howard Hardesty as receiver of the Bank, who, in turn, had succeeded Robert C. Miller as receiver of the Bank.

The instant suit was filed by Howard Hardesty, as receiver of the Bank, in the Circuit Court of Marion County, West Virginia (R. 11-24) against the respondent to compel the respondent to perform its contract to purchase from such receiver certain real estate in Fairmont, West Virginia.

The bill of complaint alleged in substance as follows:

Robert C. Miller, as receiver of the Bank, had obtained a judgment against a debtor of the Bank, and thereafter had caused a judicial sale of certain real estate in Fairmont, West Virginia, belonging to such debtor to be made (R. 14-19). At such sale Miller, as such receiver, had purchased the real estate (R. 18) and the proceeds had been credited on the judgment (R. 19). The deeds to the real estate (R. 19, 80-91) ran to

> "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association."

Thereafter Miller died, and Howard Hardesty was appointed receiver of the Bank in his place (R. 13). Hardesty later entered into contracts (R. 20, 91-126) to sell such real estate to the respondent for $8,100; under those contracts the respondent paid down $2,025, and agreed to pay the balance upon delivery of the deed; 30 days was allowed the respondent to examine title (R. 20, 91). The respondent later refused to complete the sale, on the ground that Hardesty did not have proper title to the real estate (R. 21-22).

The bill of complaint was then filed by Hardesty, as receiver, to compel specific performance of the contract.

The respondent filed a demurrer (R. 144-148) to the bill of complaint. The Supreme Court of Appeals of West Virginia thus summarizes the contentions of the respondent's demurrer (R. 195-196):

> "In support of the demurrer, defendant contends that the bill of complaint shows on its face that plaintiff does not have legal title to the four parcels hereinbefore mentioned and that the conveyance thereof operated to vest title to the real estate in Robert C. Miller, individually, and that the words 'Receiver of The National Bank of Fairmont, an insolvent national banking association' are *descriptio personae* of the grantee; that the title to the real estate did not pass to Miller's successor by operation of law or any other instrument; that the deeds are plain and unambiguous; that the construction thereof cannot be resorted to to explain any trust estate, and that the heirs-at-law of Robert C. Miller are now the owners of the legal title to the real estate conveyed thereby. ***"#

The Circuit Court of Marion County, West Virginia, overruled the respondent's demurrer, without opinion (R. 149).

The petitioner's brief, at pp. 5 and 6, by rearranging the order of the respondent's contentions and changing their emphasis, gives an entirely erroneous impression of these contentions.

(1) Decision of Supreme Court of Appeals of West Virginia of March 15, 1941

On certification of points of law to the Supreme Court of Appeals of West Virginia (R. 149-153), the Supreme Court of Appeals on March 15, 1941, handed down an opinion (R. 194, 14 S. E. (2d) 438) reversing the ruling of the Circuit Court of Marion County "without prejudice to the rights of any person who may assert ownership of the four parcels of land mentioned in this cause" (R. 198, and see the order at R. 153), and on May 19, 1941, denied a petition for rehearing (R. 154).

It is from this opinion that the petitioner is really appealing, since it is on the basis of this opinion that the Circuit Court of Marion County later entered the order dismissing the petitioner's bill of complaint which the petitioner now seeks to have this Court review.

The Supreme Court of Appeals of West Virginia states in its syllabus (prepared by the Court) exactly what its holdings were (R. 194, 14 S. E. (2d) at p. 436):

> "1. Whether a conveyance of land passes a legal or equitable estate therein is determined by the law of the state where the land is situated.
>
> 2. Where a deed conveyed land to 'R. C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association', legal title to the land described therein passed to the receiver as an individual.
>
> 3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver as an individual, does not pass to his successor by operation of law."

Under West Virginia law, the syllabus, prepared by the Court itself, constitutes the law decided in the case. See *Bank v. Burdette*, 61 W. Va. 637, 57 S. E. 53, where the Court said at 57 S. E. p. 54:

> "Now, our Constitution requires the court to make the syllabus, and it is that which is the real decision over the opinion,"

and *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, at p. 356, where this Court said:

> "There is no room for doubt as to the scope of the decision in the Griffin case. The syllabus —(p. 480) which in West Virginia is the law of the case, whatever *may* be the reasoning employed in the opinion of the Court—is as follows . . . ".

It is therefore clear, beyond question, that the Supreme Court of Appeals of West Virginia decided three things, and three things only.

The first was the decision that the law of West Virginia determined what title Miller took by the conveyance of West Virginia real estate to "R. C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association" (R. 197).

Secondly, having decided that West Virginia law governed, the Court held that, under West Virginia law, the deeds to Miller having been made "to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* and title vests in the grantee indvidually" (R. 197).

Thirdly, title having vested by the deeds in Miller *as an individual*, the Court could find no statute which passed the title from Miller *as an individual* to the successor receiver of the Bank (paragraph 3 of the syllabus, quoted *supra*; R. 194).*

The petitioner's brief (pp. 7-8) gives an entirely erroneous impression of the decision of the Supreme Court of Appeals. The decision will be analyzed in greater detail below, and it is sufficient at this point to emphasize, again, that under West Virginia law the syllabus constitutes the law of the case, and that such syllabus does not even mention the collateral comments which the petitioner is now contending are the holdings of the Court.

However, the petitioner is not helped by this argument, for it is clear that, the Court having held that, under West Virginia law, the deeds vested title in Miller *as an individual*, any statement as to what would have happened if the deeds had vested title in him *in his fiduciary capacity*, is the merest dictum.

This is conclusively proved by the fact that, even if the Court had felt that there was a statute transferring Miller's fiduciary title, at his death, to the successor receiver by operation of law, the Court would still have reached the result that it did—since it had already held that, under West Virginia law, Miller got no title whatsoever in his fiduciary capacity.

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* If the wording of paragraph 3 of the syllabus, referring to the passage of title from Miller *as an individual* is ignored (and of course it cannot be), it might be argued—as the petitioner's brief does (pp. 7-8)—that the Court decided that, even if the deeds *had* vested title in Miller in his fiduciary capacity (and not in his individual capacity), the Court could find no statutory authority for the transfer of such title at Miller's death, by operation of law, to the successor receiver.

(2) Proceedings After Decision of Supreme Court of Appeals of March 15, 1941

After the case was remanded to the Circuit Court of Marion County as a result of the decision of the Supreme Court of Appeals of March 15, 1941, the plaintiff filed an amended and supplemental bill of complaint (R. 154-173) on April 15, 1941, joining the heirs-at-law of Robert C. Miller as parties, and praying that a trust of the real estate be decreed and that it be held that neither Robert C. Miller nor his heirs had any interest in the real estate individually. The respondent and the heirs answered the amended bill and admitted its allegations (R. 175, 177).

Later, the plaintiff reversed his course, and moved to dismiss his own amended bill (R. 180). The respondent, which was anxious to have the title to the real estate properly and finally passed upon, with all the proper parties before the Court, resisted the motion (R. 183-186), which, however, the Circuit Court granted on October 6, 1941 (R. 182). Later, the Circuit Court by order entered February 13, 1942 (R. 186-191) dismissed the original bill of complaint. It is that order which this Court is asked to review. The petitioner then appealed to the Supreme Court of Appeals of West Virginia from such order, and an appeal was refused by that Court (R. 1).

IV

Question Presented

There is only one question presented by this petition:

Did the Supreme Court of Appeals of West Virginia properly hold that West Virginia law governs the construction and effect of deeds of West Virginia real estate

running to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association"?

If that holding is correct, the petition must be denied.

This follows from the fact that the West Virginia Court's decision as to the West Virginia law applicable to those deeds involves a non-federal question not reviewable by this Court, and from the further fact that such decision was decisive of the case—regardless of any discussion of any collateral so-called federal questions.

As will be pointed out in detail below, petitioner's brief (pp. 12-13) incorrectly states the questions presented in this case.

There is no issue (petitioner's brief, p. 12, par. (1), to the contrary notwithstanding) as to whether the receiver of a national bank, when authorized to purchase real estate on behalf of the receivership, has capacity and power to take title to the property in his name *in his fiduciary and representative capacity.* That question is not presented in this case at all, for in point of fact Miller took deeds of West Virginia real estate which the West Virginia court has held, under the governing West Virginia law, conveyed the title to him *individually*, and *not* to him in his fiduciary and representative capacity. There can be no issue as to Miller's capacity or power to do something which in fact he did not do.

Also, there is no question in this case (petitioner's brief, p. 12, par. (2), to the contrary notwithstanding) as to whether, upon the death or resignation of a receiver of a national bank, the assets held by such receiver in his fiduciary capacity pass, by operation of the national banking laws, to the successor receiver. Here, under West Vir-

ginia law, the deeds of West Virginia real estate to the predecessor receiver vested the real estate in him in his *individual capacity*, and not in his fiduciary capacity; there can therefore be no question as to the applicability of the national banking laws, since the predecessor receiver never obtained the real estate in his fiduciary capacity as a national bank receiver at all, but only *as an individual*.

V

Argument

A. The West Virginia Court correctly held that West Virginia law governs the construction of deeds of West Virginia real estate running to the receiver of a national bank located in West Virginia.

It is well settled that the transfer of real estate is governed by the law of the state in which the real estate is situated.

The opinion of the Supreme Court of Appeals of West Virginia (R. 196-197, 14 S. E. (2d), at p. 438), sums up convincingly the law on the point:

> "*** Does the law of this jurisdiction apply in the construction of a deed conveying land to the receiver of a national bank? It seems that the answer to this question is largely determinative of the result herein. The alienation and transfer of real estate is governed by the law of the state in which the land is located. *Olmstead v. Olmstead*, 216 U. S. 386, 54 L. Ed. 550, 30 Sup. Ct. 292; *In re Barnett* (2 C. C. A.) 12 Fed. (2d) 73; *Irving Trust Co. v. Maryland Casualty Co.*, 83 Fed. (2d) 168. 'The nature of the interest created by the conveyance is determined by the law of the state where the land is situated.' Restatement of the Law, Conflict of Laws, Section 221. Gen-

> erally, as to the legal effect and interpretation of words used in an instrument conveying land, see Conflict of Laws, supra, Sections 214, *et seq.* It is no longer open to question that the legal effect and interpretation of words used in an instrument conveying land situate in this state are to be measured by the laws of this jurisdiction. *Klink v. Price*, 4 W. Va. 4, 6 A. L. R. 37, 268. This principle is recognized and discusssed in the case of *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587. This being true, we look to the laws of this state to determine what title Miller took by the conveyance to him as 'receiver of the National Bank of Fairmont, an insolvent National Banking Association'."

The fact that a national bank, or the receiver of a national bank, is involved in the deeds to the West Virginia real estate, has no effect whatsoever on the conclusion that West Virginia law governs. The acquisition and transfer of real estate by national banks is governed by the law of the state in which the real estate is situated. See *Nagle v. Herold*, 30 F. Supp. 905 (W. D. N. Y., 1939), where the Court said, at p. 905:

> "The Seneca National Bank of West Seneca is a national bank. Insofar as its contracts are concerned it is subject to the laws of the State of New York, in which it is located. 'National banks are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than the nation. All their contracts are governed and construed by state laws. *Their acquisition and transfer of property*, their right to collect their debts, and their liability to be sued for debts, are all based on state law. **** " (*First*) *National Bank v. Commonwealth* (*of Kentucky*), 9 Wall. (353), 362, (19. L. Ed. 701.' *McClellan v. Chipman*, 164 U. S. 347, 356, 17 S. Ct. 85, 87, 41 L. Ed. 46; *First National Bank v. State of Missouri*, 263 U. S. 640, 656, 44 S. Ct. 213, 68 L. Ed. 486. See, also, *Lewis, Rec'r. v. Fi-*

delity & Deposit Co. of Maryland, 292 U. S. 559, 54 S. Ct. 848, 78 L. Ed. 1425, 92 A. L. R., 794." (Italics ours)

In the leading case of *National Bank v. Commnwealth*, 9 Wall. 353 (1869), this Court said, at p. 362:

> "They (national banks) are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by the State laws. *Their acquisition and transfer of property*, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." (Italics ours)

It is clear, then, that the Supreme Court of Appeals of West Virginia was correct in its holding that the deeds to "Robert C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association," being deeds of real estate located in West Virginia, were to be construed in accordance with the law of West Virginia.

B. No federal ground was involved in the decision that, under West Virginia law, the deeds transferred title to Robert C. Miller as an individual and not in his fiduciary capacity.

It was purely on grounds of West Virginia law that the West Virginia Supreme Court of Appeals decided that, under West Virginia law, the deeds of West Virginia real estate to R. C. Miller had the effect of transferring title to him *as an individual*, and not in his fiduciary capacity.

The first step of the Court was to hold that, under West Virginia law, the deeds were not ambiguous, and that such deeds, alone, determined the status of the title to the land in question (R. 197).

The Court then went on to hold (R. 197):

> "In this state it has been said that where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually. *Hyman v. Swint*, 94 W. Va. 627, 119 S. E. 866; *Donahoe v. Rafferty*, 82 W. Va. 535, 96 S. E. 935. See also, *Pfeiffer v. Rheinfrank*, 37 N. Y. S. 1076. We see no reason to change the rule announced in the cases of *Hyman v. Swint* and *Donahoe v. Rafferty*, supra."

The Court accordingly held that, as a matter of West Virginia law,

> "Where a deed conveyed land to 'R. C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association', legal title to the land described therein passed to the receiver as an individual."

This is the language of paragraph 2 of the Court's syllabus (R. 194), which, as already shown, constitutes under West Virginia law the actual decision of the case.

It was thus not any doubts or questions as to the National Banking Act that led the Court to hold that, as a matter of West Virginia law (which it had just held was the governing law), title passed to Robert C. Miller individually and not in his fiduciary capacity. It was the West Virginia doctrine that a title or office is merely *descriptio personae* (as exemplified in *Hyman v. Swint* and *Donahoe v. Rafferty*, cited in the portion of the Court's opinion just quoted) which led the Court to reach the decision that it did.

It is therefore clear beyond the possibility of question that the holding of the Court that the deeds transferred

the title to Robert C. Miller *as an individual*, and not in his fiduciary capacity, was a holding based solely on *West Virginia* law, and that no federal ground whatsoever was involved in the holding.

C. The decision that, under West Virginia law, the deeds transferred title to Robert C. Miller as an individual and not in his fiduciary capacity, completedly disposed of the case, and the so-called federal questions mentioned by the petitioner were not involved in the decision at all.

The Court's holding that, under West Virginia law, the deeds transferred the title to the West Virginia real estate to Robert C. Miller as an individual and not in his fiduciary capacity, completely disposed of the case. With title in Miller individually at the time of his death, and with no transfer from him or his heirs to Hardesty, his successor as receiver, the Court was of course required to uphold the respondent's demurrer, since it was clear that Hardesty had never obtained title from Miller as an individual or from Miller's heirs-at-law, and was therefore not in a position to tender good title to the respondent.

The so-called federal question as to whether, under the national banking laws, Miller had the right to take title to West Virginia real estate *in his fiduciary capacity* (petitioner's brief, pp. 12, 19), was thus not involved in the decision at all.

Miller did *not* take title in his fiduciary capacity, and the question of whether he had authority to do so therefore was not in issue. Instead, Miller took deeds which, under the applicable West Virginia law, transferred title to him *not* in his fiduciary capacity, but in his *individual capacity*.

When the Court discusses Miller's having "no authority to take title to the property in his own name" (R. 198), it is clear that the Court means that he had no authority to take title in his own name *as an individual*, since that was the legal effect, under the West Virginia *descriptio personae* cases, of the deeds which he did take.

That the national banking laws powers of Miller had nothing to do with the Court's decision is further shown by the syllabus (the *actual* decision, under West Virginia law, *supra*, p. 6), which never mentions the national banking laws, but straightforwardly states (R. 194) that the law of the state where the land is situated governs the conveyance, and that the deeds in question transferred legal title to the receiver *as an individual*.

Nor was there involved in the decision any so-called federal question as to the passage of title to receivership assets by operation of law under the national banking laws from one receiver of a national bank to his successor receiver (petitioner's brief, pp. 12, 19-20, to the contrary notwithstanding).

Paragraph 3 of the syllabus of the Court's decision is decisive in this regard. It will be remembered that it reads (R. 194):

> "3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver *as an individual*, does not pass to his successor by operation of law." (Italics ours)

Here it is clear that the Court, which in the preceding paragraph 2 of the syllabus had held that legal title to the land was in Miller *as an individual* (and *not* in his fiduciary capacity), was here holding that there was nothing in the national banking laws which purported to pass title from Miller *as an individual* to his successor, Hardesty.

Indeed, the petitioner does not purport to claim that there is any such federal statute, or that there is any federal ground for claiming that title passed, by operation of law, from Miller *in his individual capacity* to his successor receiver.

Instead, the petitioner takes the position that the Court held that, upon the death or resignation of a national bank receiver, there is no federal statute providing that title to property held by that receiver *in his fiduciary capacity* passes by operation of law to the successor receiver (petitioner's brief, pp. 12, 20).

As we have shown, the Court's language is not in fact directed to the transfer by operation of law of title to property held by a receiver *in his fiduciary capacity*, since no such situation was before the Court, Miller having acquired the property by deeds which vested the title in him *in his individual capacity* and *not* in his fiduciary capacity.

However, even if the Court's language as to there not being any statutory provision for the passage of title from a deceased receiver to his successor by operation of law, could be considered to be directed to the passage of title held by a receiver in his fiduciary capacity, the petitioner's contentions as to the point would not be helped. Thus, any statement by the Court that, as a matter of federal law, there is no transfer by operation of law of property held by one national bank receiver in his fiduciary capacity to a successor receiver, would be the merest dictum. This is so for the simple reason that the Court had just held that, under the applicable West Virginia law, Miller, the predecessor receiver, did *not* hold the title in his fiduciary capacity but, instead, held it in his *individual capacity*.

Nothing could be more of a dictum than such a statement—a statement based on the hypothesis that what the Court has just held to be so is not so.

Note, also, that, even if the petitioner's contention that the national banking law in some undisclosed fashion does transfer the fiduciary title of a national bank receiver at his death by operation of law to the successor receiver, could be considered correct, the Court would still have reached exactly the result that it did reach. This follows from the fact that the Court had already held that, under West Virginia law, Miller had received no title at all in his fiduciary capacity, but had received title only in his individual capacity. That being so, the supposed transfer by operation of law would never come into effect at all, and the Court would still be required to hold that Hardesty did not have the title when the respondent refused to accept deeds from him.

Accordingly, since the so-called federal questions mentioned by the petitioner are not really involved in the Court's actual decision at all, we submit that the decision on the applicable West Virginia law, completely disposing of the case, is not subject to review by this Court.

D. This Court will not grant certiorari where, as here, the non-federal ground is decisive, and severable from any claimed federal grounds.

We believe that we have shown, under Point C above, that in fact no federal questions were involved in the actual decision of the Supreme Court of Appeals of West Virginia. However, the existence of any such federal grounds, even if they could be considered to have been involved in the decision, is not enough to support a writ of certiorari.

It is settled law that, where the judgment of a state court is predicated upon non-federal and federal grounds, and the non-federal grounds are severable from, and independent of, the federal grounds, and are broad enough to sustain the judgment, this Court will not grant a writ of certiorari to review such judgment. *Johnson v. Risk*, 137 U. S. 300; *Adams v. Russell*, 229 U. S. 353, 359; *Doyle v. Atwell*, 261 U. S. 590, 592; *McCoy v. Shaw*, 277 U. S. 303; *Ancient Egyptian Order v. Michaux*, 279 U. S. 744, 745; *United States v. Hastings*, 296 U. S. 188; *Fox Film Corp. v. Muller*, 296 U. S. 209, 210 and *Honeyman v. Hanan*, 300 U. S. 14.

Under this doctrine, it is clear that the writ of certiorari should be denied, for the non-federal ground of the West Virginia Court's decision that, under the West Virginia legal doctrine of *descriptio personae*, Miller did not receive legal title to the West Virginia real estate in his fiiduciary capacity, but, instead, received it in his individual capacity, is severable from and independent of any claimed federal ground, and is broad enough, by itself and standing alone, to sustain the judgment that Hardesty did not have good title to the real estate when he asked the respondent to complete the sale.

VI

There Are No Reasons for Granting the Writ

The reasons relied upon by the petitioner for the requested allowance are set forth in the petitioner's brief at pp. 23-25, and may be summarily dealt with.

The petitioner first repeats the entirely erroneous claim that the Supreme Court of Appeals of West Virginia decided that

> "A receiver of a national bank cannot take title in his own name, in his representative or fiduciary character as receiver, of real estate acquired on behalf of the receivership" (petitioner's brief, p. 23).

As we have already shown, the Court's decision involved no such holding at all. It merely held that, under West Virginia law, a deed made out to "R. C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association," passed legal title to Miller *as an individual*, and not as a fiduciary.

The petitioner next repeats the equally erroneous contention that the Supreme Court of Appeals of West Virginia decided that under the national banking laws title to assets held by a national bank receiver *in his fiduciary capacity* does not pass, by operation of law, to a successor receiver (petitioner's brief, p. 24). As we have also already shown, the Court made no such holding, since its remarks as to the national banking laws were directed at the transfer of assets held by a receiver *as an individual* and since, in any event, such remarks, even if considered to apply to assets held by a receiver in his fiduciary capacity, would be the merest dictum, inasmuch as the Court had before it assets which, under West Virginia law, were the property of the receiver in his *individual capacity.*

The petitioner then refers (petitioner's brief, p. 24) to a supposed long-established construction and interpretation by the Comptroller of the Currency that title may properly be taken by national bank receivers of real estate acquired by them. We pass the fact that no such construction or interpretation is shown in the record in this case, and again point out that there is absolutely nothing in the decision of the West Virginia court which prevents national bank receivers from acquiring West Virginia real estate in their fiduciary capacity *if they will only take the modi-*

cum of pains required to have the deeds to them conform to the simple requirements of West Virginia law for establishing fiduciary capacity. All that Miller needed to do in the instant case was to make sure that the deeds to him clearly and unambiguously indicated that he was acquiring the real estate in a fiduciary capacity. For example, he could have made the deeds read "to Robert C. Miller *as* receiver," which would have clearly established his fiduciary capacity.* See *Hughes v. Charlton*, 104 *W. Va.* 640, 141 S. E. 1. *Fleck v. Ellis*, 87 S. E. 1055; 144 Ga. 732. *State v. Gray*, 111 So. 242. This he did not take the trouble to do; instead he took deeds which fell squarely within the long-established West Virginia *descriptio personae* doctrine and gave no indication, under that doctrine, of his fiduciary capacity.

The petitioner's brief (p. 24) refers to the validity and effectiveness of titles to real estate dealt in by national bank receivers. It is submitted that such validity and effectiveness would be best served by a closer attention to West Virginia real estate law on the part of such receivers, and that the stability of West Virginia real estate titles would be greatly disturbed by the purported review, here sought by the petitioner, of the long-established West Virginia real estate law as to *descriptio personae* deeds. See *Hyman v. Swint* and *Donahoe v. Rafferty*, supra.

It is also submitted that the "future guidance" which the petitioner's brief (p. 25) implies is needed by the Comptroller of the Currency in the administration of the national laws will be amply provided by the denial of this writ of certiorari and the consequent conclusion that deeds to West Virginia real estate should be prepared in the light of West Virginia law.

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* Note that this suit was brought by "Howard Hardesty *as* receiver * * * " (R. 1. 3, 11, 13 *et passim*).

It should also be pointed out that all that the petitioner needs to do to straighten out the difficulties resulting from his predecessor's failure to observe West Virginia real estate law is to bring a suit to impress a trust on the real estate and to join the heirs of Miller in the suit. This is the sensible course which the petitioner first took after the decision of the Supreme Court of Appeals, when he filed his amended and supplemental bill of complaint (R. 154-173) on April 15, 1941. In that course the respondent and the heirs of Miller fully cooperated by admitting the allegations of the new bill (R. 175-178, see supra p. 9). However, as stated above, (p. 9), the petitioner later reversed his course, obtained a dismissal of his amended and supplemental bill of complaint against the respondent's objections, and chose to stand on his original bill of complaint—hence this petition.

The respondent will cheerfully complete the purchase of the West Virginia real estate involved in this suit as soon as the plaintiff can properly clear up the title to that real estate. But that title should be cleared up within the framework of West Virginia law by a suit (such as the amended bill which the plaintiff filed and then withdrew) to establish that Miller took the real estate as a fiduciary. Title cannot be cleared by the instant attempt to get this Court, simply because a national bank receiver is a party, to reverse a long-established and well-settled doctrine of West Virginia real estate law which this Court has no jurisdiction to review.

VII

Conclusion

The State Court's decision is based on adequate non-federal grounds, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 315.

J. S. ODLAND, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA, *Petitioner*,

v.

FAIRMONT SUPPLY COMPANY, A CORPORATION, *Respondent*.

REPLY BRIEF ON BEHALF OF PETITIONER.

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HARRIET BUCKINGHAM,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

FAIRMONT SUPPLY COMPANY, A CORPORATION, *Respondent*.

REPLY BRIEF ON BEHALF OF PETITIONER.

I.

FEDERAL QUESTIONS.

If, as Contended by the Petitioner, His Powers and Authority as an Officer of the United States to Take Title to Real Estate Are to be Determined Under the Federal Statute, as in a Code by Itself, the Federal Questions Thereby Presented Are Not Converted Into Nonfederal Questions Solely by Reason of the Fact that in Deciding Them the Courts Below Applied the Law of West Virginia Rather than the National Banking Laws.

The Question of Whether State Law, or the National Banking Law, Should Govern the Primary Issues of Title Presented in the Instant Case, is Itself a Federal Question. Obviously, determination by the State court that State law should control, does not convert Federal questions into non-federal questions; nor does such decision by the State court oust this court of jurisdiction to review the questions presented. *First National Bank* v. *Anderson,* 269 U. S. 341, 346; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744, 745; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 121; *Carter* v. *Texas,* 177 U. S. 442, 447; *Truax* v. *Corrigan,* 257, U. S. 312, 324, 325; *Norris* v. *Alabama,* 294 U. S. 587, 590; *Great Northern Ry.* v. *Washington,* 300 U. S. 154, 166; *Lovell* v. *Griffin,* 303 U. S. 444, 450; *Ward* v. *Love County,* 253 U. S. 17, 22.

Nature of the Federal Questions Presented, in View of the Controlling Effect of National Banking Law in the Instant Case.

Petitioner does not deny the *general doctrine* that ordinarily the law of the situs, i.e., the law of the state where land is located,—governs questions concerning acquisition of title to land including questions of succession to title upon the death of the land owner. However, it would seem clear that if, either by express provision of the national banking statutes or by implementation of said statutes by court decisions interpreting and construing the same, the issues in the instant case are embraced within the provisions and requirements of the national banking laws as thus implemented, the general doctrine concerning the law of the situs must give way to the paramount provisions of the national banking law as applied to the particular situation presented. It is, of course, settled doctrine that the national banking laws, as interpreted and construed by the courts, constitute a complete system covering not only the organization but also the liquidation in receivership, of national banks, and that state laws cannot be effective when in conflict with the national banking law, or where the state law,

if applied, would defeat the purposes of the national banking law.

Cook County National Bank v. *United States,* (1882) 107 U. S. 445, 448;
Jennings v. *U. S. F. & G. Co.* (1935) 294 U. S. 216, 226;
Davis v. *Elmira Savings Bank,* (1896) 161 U. S. 275, 283;
Yonkers v. *Downey,* (1940) 309 U. S. 590, 596.

It is also settled doctrine that receivers of national banks are officers of the United States and agents of the Comptroller of the Currency, and derive their authority and power and capacity to act from the national banking law (as implemented by court decisions), subject, of course, to appropriate instructions from the Comptroller of the Currency.

Kennedy v. *Gibson, et al.,* (1869) 8 Wall. 498, 504, 506;
In re Chetwood, (1897) 165 U. S. 443, 458;
U. S. v. *Weitzel,* (1918) 246 U. S. 533, 541;
Pufahl v. *Parks,* (1936) 299 U. S. 217, 225;
Cooper v. *O'Connor,* (App. D. C. 1938) 99 F. (2nd) 135, 139, *cert. den.* 305 U. S. 643;
Cooper v. *O'Connor,* (App. D. C. 1939) 105 F. (2nd) 761, 763.

Rule 41 of the Revised Rules of this court requires that the transcript of record shall include, *inter alia,* the opinion of the court below. It is settled doctrine, in view of this requirement, that this court may examine the opinion of the court below to determine the existence and the nature of the alleged Federal question presented to this court for review and to determine whether substantial Federal questions were actually presented to and passed upon by the court below in deciding the case. *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 98, 99; *Philadelphia Fire Association* v. *New York,* 119 U. S. 110, 116; *Gross* v. *United States Mortgage Co.,* 108 U. S. 477, 486.

Opinion of the Court Below Discloses that Substantial Federal Questions Were Presented to and Decided by the Court Below.

The following extracts from the opinion of the court below definitely establish that the three federal questions enumerated by petitioner (Petition pages 9-10) were presented to, passed upon, and decided by, the court below:

> "In order that the questions involved in this certificate may be properly discussed, it is necessary to consider the effect of the appointment of a receiver for a national banking association by the Comptroller of the Currency, as well as the authority and powers of the receiver so appointed.
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> "When a national bank becomes insolvent and the Comptroller of the Currency takes charge of its affairs and appoints a receiver, all its assets pass to the possession and control of the receiver in trust to reduce the same to money and apply them as directed by the National Banking Act. U. S. C. A. Title 12, Sections 192 and 194; *Anderson* v. *Cronkleton* (C. C. A. Neb. 1929), 32 Fed. (2nd) 170. The receiver of a national banking association has the power to purchase real estate under the direction of the Comptroller of the Currency, when such is necessary to protect the assets of the insolvent bank. U. S. C. A. Title 12, Sections 198, 199 and 200.
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> "An insolvent national bank does not lose its corporate identity by the appointment of a receiver. *The First National Bank of Bethel* v. *The National Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840. It may still enter into transactions not forbidden by law. 'It is clearly, we think, the intention of the law, that it should continue to exist as a person in law, * * *.' *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 Sup. Ct. 439; *Hiatt* v. *Warren* (5 C. C. A.) 44 Fed. (2nd) 313; *Neely* v. *Planters National Bank of Clarksdale, Miss.* (D. C. N. D. Miss. 1931) 48 Fed. (2nd) 266. It would seem that the powers of a receiver of a national banking association and his capacity to control and deal with the assets thereof are well and fully defined." (R. 145, 146)

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"In the case of *Rinehart, Receiver* v. *Ireland*, 120 W. Va. 599; 199 S. E. 871, also cited by counsel, this Court had under consideration the question of the powers of the receiver of a state bank. The statute which measures the power and authority of the receiver of a state bank is not in terms the same as the statute which defines the powers and authority of the receiver of a national bank. The law under which the receiver of a state bank operates, provides that he shall have all the powers vested in special receivers by general law, thus giving the receiver of a state bank appointed under Code, 31-8-32, wider powers than those given to the receiver of a national bank. The receiver of a national bank is an agent whose authority is limited by law. *Whelan* v. *Blankenbeckler* (5 C. C. A.), 87 Fed. (2nd) 81; *Scott* v. *Armstrong*, (1892) 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

"Miller had the power to purchase the real estate here in question, if the protection of the assets of the insolvent association required the same. However, if he used the funds of his trust in purchasing such real estate, he did not have authority to take title to the property in his own name. Since Miller was apparently acting in a fiduciary capacity as receiver of the bank, he exceeded his authority in accepting the deeds herein mentioned, and the legal title to the real estate vested in him individually. We are not aware of any statute which authorizes the receiver of a national banking association to take title from his deceased predecessor by operation of law. There being no such statutory provision, the legal title, upon the death of Miller, passed to his heirs by the laws of descent prevailing in this jurisdiction." (R. 147, 148)

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"However, another question now arises: Does the law of this jurisdiction apply in the construction of a deed conveying land to the receiver of a national bank? It seems that the answer to this question is largely determinative of the result herein. The alienation and transfer of real estate is governed by the law of the state in which the land is located." (R. 146)

Petitioner respectfully submits:

(1) That the questions specified on pages 9-10 of the petition, constitute substantial federal questions which were effectively raised upon the record, and which were presented to and decided by the court below in rendering the judgment now sought to be reviewed.

(2) That the record sufficiently establishes, for purpose of review:

(a) That the lands in question were purchased by petitioner's predecessor,—Robert C. Miller, as Receiver of The National Bank of Fairmont, West Virginia, under authority of the national banking laws (Sections 198-200, Title 12, U. S. C.) by direction of the Comptroller of the Currency, with the approval of the Secretary of the Treasury, and that said lands were paid for by said Miller, as Receiver, from the funds of the Receivership bank.

(b) That title to said lands passed to said Miller in his fiduciary and representative capacity as Receiver, and did not pass to said Miller in his individual capacity.

(c) That after the death of said Miller, title to said lands passed, by operation of the national banking laws, from said Miller as Receiver, to petitioner as successor receiver.

(d) That the judgment of the court below deprives petitioner of property rights asserted by him as receiver under the national banking laws.

The decisions of this court cited at pages 12 and 13 of the respondent's brief for the settled doctrine that the acquisition and transfer of property by *going National banks* is governed by State law, are inapplicable to the petitioner, an officer of the United States acting under the Federal statute. National bank Receivers take title to real and personal property in which the bank never had an interest and could not acquire an interest as in the case of compromises under 12 U. S. C. 67 of the stock assessment liability, an asset of the Receivership and not an asset of the bank.

The respondent suggests that the difficulties here presented can be resolved by a further proceeding in the trial court. But the decision in such a case would not settle the title in the numerous similar transfers in and out of West Virginia where the Receiverships have been closed and no funds remain, nor would it advise the Comptroller whether he must look to the laws of the 48 States and the Territories rather than to the National Banking Act in issuing further instructions to his agents the Receivers.

We again respectfully submit that the petition for certiorari should be granted.

Respectfully,

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